Supreme Court, U.S.
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No. 95-685

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ANHEUSER-BUSCH, INC. and PENN ADVERTISING OF BALTIMORE, INC.,
Petitioners,
v.
MAYOR AND CITY COUNCIL OF BALTIMORE CITY; KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; CITY COUNCIL OF BALTIMORE CITY; and DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF

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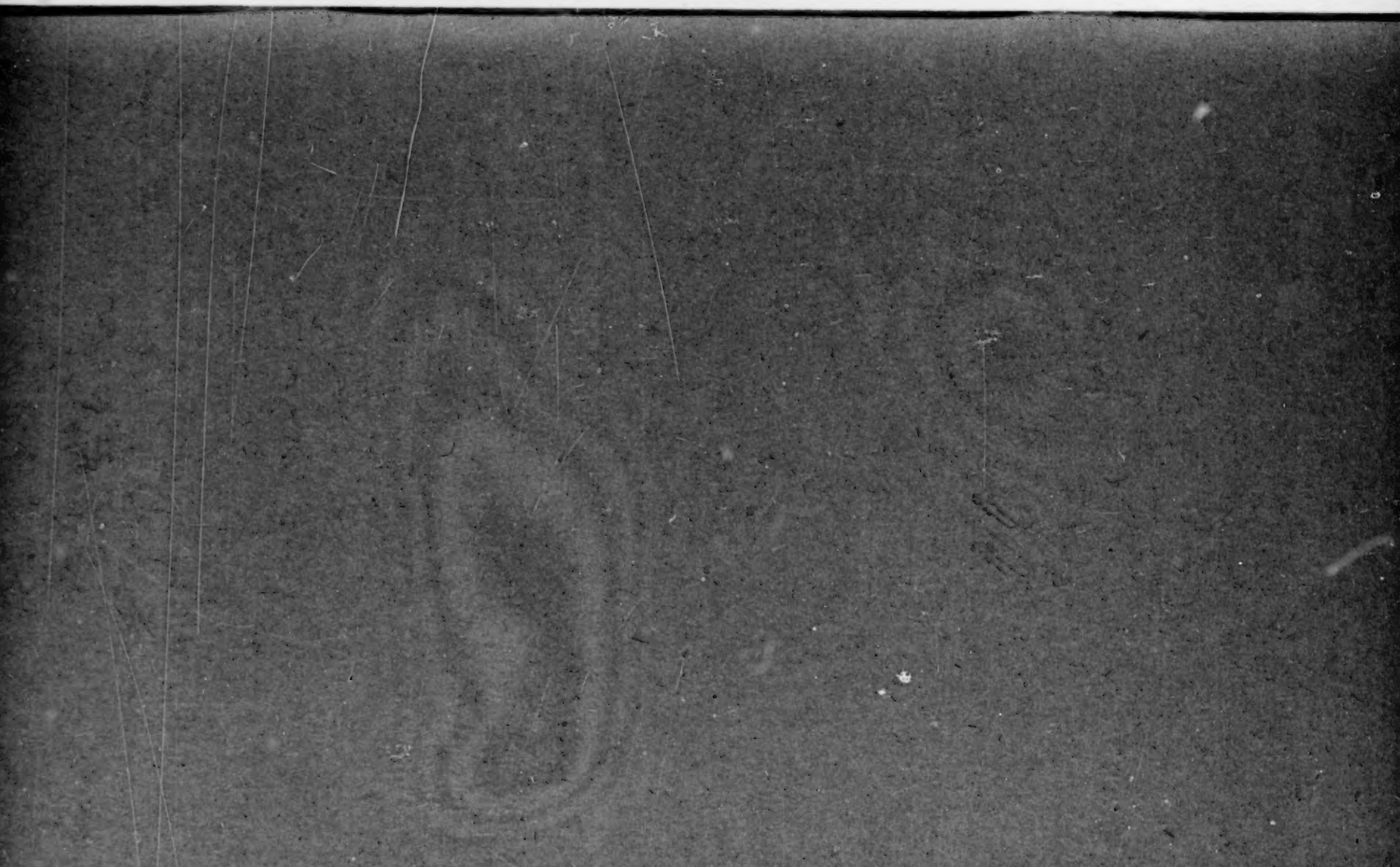
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SUPPLEMENTAL BRIEF

The Court's decision in *44 Liquormart, Inc. v. Rhode Island*, No. 94-1140 (U.S. May 13, 1996), underscores the errors in the Fourth Circuit's unconstitutionally deferential approach to legislative restrictions on commercial speech. Whereas the opinions of the Justices make plain that the minimum protection to be afforded commercial speakers is a vigorous application of the *Central Hud-*

son * test, the Fourth Circuit mistakenly applied a weakened version of that test, relying on the now explicitly superseded decision in *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986). The Fourth Circuit erred by deferring unquestioningly, in the context of a motion to dismiss under Fed. R. Civ. P. 12(b)(6), to the Baltimore City Council's purported justification for its restriction on commercial speech, on a record which contained no independent findings of fact or, for that matter, any developed evidence. Accordingly, this petition should be granted, the Fourth Circuit's decision should be summarily reversed, and the case should be remanded to the district court for discovery, findings of fact and further proceedings consistent with the Court's decision in *44 Liquormart*. *See Turner Broadcasting Sys., Inc. v. F.C.C.*, 114 S. Ct. 2445, 2472 (1994) (remanding First Amendment case to district court to allow development of a "more thorough factual record" because the government had not met its burden of proof).

A majority of the Court in *44 Liquormart* concluded that *Posadas* is not useful as precedent for defining the *Central Hudson* test. Slip op. (Stevens, J.) at 23-24; slip op. (O'Connor, J.) at 4-5. *Posadas* stood alone among the Court's commercial speech decisions as limiting judicial review to the acceptance "as reasonable, without further inquiry," of a government's purported justification for restricting speech. Slip op. (O'Connor, J.) at 4. *44 Liquormart* thus makes clear that *Central Hudson* is not satisfied by the apparent "reasonableness" of a legislative restriction on speech; rather, the courts must hold the government to its burden of proof by independently scrutinizing the evidence in a developed record.

The Fourth Circuit, however, used the "reasonableness" approach and did so in a manner even less protec-

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* *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

tive of free speech than the First Circuit did in *44 Liquormart*, holding that legislative findings cannot be subjected to "judicial review under a clearly erroneous standard or otherwise." App., *infra*, 11a. The court thus refused on Rule 12(b)(6) motions to give any weight to the well-pleaded allegations in the complaints, instead deferring completely to Baltimore's legislative "findings." If the Fourth Circuit had applied an appropriate level of First Amendment protection—whether it be as described in *44 Liquormart* by Justice Stevens, Justice Thomas or Justice O'Connor—it necessarily would have concluded that Baltimore did not satisfy either the third prong or the fourth prong of *Central Hudson* on its motions to dismiss.

In conflict with *44 Liquormart*, the Fourth Circuit described the inquiry under the third prong in highly deferential terms. Relying on *Posadas*, the Fourth Circuit stated that the inquiry is "whether it was *reasonable* for the legislative body to conclude that its goal would be advanced in some material respect by the regulation." App., *infra*, 14a-15a (emphasis supplied). As explained above, this "reasonableness" approach is not the law. Like the First Circuit in *44 Liquormart*, the Fourth Circuit erred in concluding that the government satisfied its burden of proof under the third prong even though there were no "findings of fact, or . . . evidentiary support" on the relevant issues. Slip op. (Stevens, J.) at 19. If Baltimore had been required to submit evidence, it would not have been able to prove that its ordinance will significantly reduce underage drinking, especially in light of the numerous exceptions to the ordinance for locations such as Memorial Stadium and Camden Yards baseball stadium. *See* Petition at 4-5.

Turning to the fourth prong, the Fourth Circuit again cited to *Posadas* as precedent for it to abstain from independent fact-finding. App., *infra*, 20a. The court declined to require Baltimore to prove why it could not use non-speech-related alternatives to achieving its asserted

goal, such as educational programs about risks associated with alcohol consumption, or better enforcement of existing laws that prohibit the sale of alcohol beverages to minors. The Fourth Circuit stated that "it is not an acceptable response to the approach taken by the City of limiting advertising exposure to say that the City must abandon altogether an approach that directly advances its goal." *Id.* Thus, the Fourth Circuit mistakenly did not allow for the development or submission of any evidence under the fourth prong.

44 Liquormart squarely rejects such a deferential approach to the fourth prong. A majority of the Court emphasized that the government has the burden of proving why it should be allowed to restrict speech when non-speech-related alternatives are available. Slip op. (Stevens, J.) at 21; slip op. (O'Connor, J.) at 2-3. Moreover, the Court specifically identified educational programs, like those that the Fourth Circuit declined to consider, as an alternative that must be addressed by the government before it can justify a restriction on advertising for alcohol beverages. *Id.*

44 Liquormart stands for the proposition that a government cannot justify a restriction on commercial speech unless a preponderance of the evidence is in its favor. It also reinforces the proposition that the courts below must scrutinize the evidence in making independent findings of fact. The First Amendment requires nothing less. The Fourth Circuit erred by deferring completely to Baltimore's legislative "findings," instead of requiring it to meet its evidentiary burdens on the third and fourth prongs of *Central Hudson*, and by blocking petitioners from developing or submitting any contrary evidence on their First Amendment claims.

CONCLUSION

The petition should be granted, the Fourth Circuit's decision should be summarily reversed, and the case should be remanded to the district court for discovery, findings of fact and further proceedings consistent with the Court's decision in *44 Liquormart, Inc. v. Rhode Island*, No. 94-1140 (U.S. May 13, 1996).

Respectfully submitted,

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